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subject only to the regulations of the board of public works, then it should have been compelled by mandamus to extend its facilities to serve the applicants. For the courts ordinarily recognize that compliance with such a requirement is merely incidental to the act of serving. In a recent Minnesota case [12] it has been held that where a court directs a public utility to serve, it impliedly directs it to procure any permits necessary to enable it to serve. This case is directly in point here unless we interpret Section 19 to mean that a franchise is an absolute prerequisite to service even though the city has no power under its charter to grant a franchise.

R. W. M.

Parent and Child—Duty of Father to Support Child After Divorce.—In a recent case,[1] the wife had obtained a decree of divorce in Nevada from her husband, a resident of California. The Nevada court awarded the wife the custody of a minor daughter and $100 a month alimony. These awards obviously not being enforceable in this State,[2] after her return to California, she was appointed guardian of the person and estate of the child. She then had the father imprisoned for his failure to furnish the child with necessaries. The Supreme Court of California discharged the prisoner, holding that under Section 196 of the Civil Code, he was under no duty to support the child. The application of this section, declaring that "the parent entitled to the custody of a child must give him support and education suitable to his circumstances," produces an effect certainly unfair to the child.

At common law, the father remains liable for the support of his child, as well after, as before, a divorce. In this country, the matter is generally covered by statutes too often loose and ambiguous, in the application of which the courts are in hopeless confusion. The decisions, however, seem to rest on either one of two general principles: first, that the liability of the parent for support is coincident with his right to the custody and services of his children,[3] and second, that it is not the policy of the law to deprive children of their rights on account of the dissensions of their parents.[4]

Previous to a divorce, the duty of support generally rests upon the father, in spite of a decree awarding custody to the mother.[5] Under the

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[12] State v. Consumers' Power Co. (Oct. 1912), (Minn.), 137 N. W. 1104.

[1] In re McMullin (Jan. 14, 1913), 45 Cal. Dec. 85.

[2] De La Montanya v. De La Montanya (1896), 112 Cal. 101, 44 Pac. 545; Code of Civil Procedure of Cal., Sec. 413; Minor, Conflict of Laws, Sec. 96.

[3] 1 Bishop, Marriage and Divorce, Sec. 557; Gilley v. Gilley (1887), 79 Me. 292, 1 Am. St. Rep. 307.

[4] 2 Bishop, Marriage, Divorce and Separation, Sec. 1223; Kelly v. City of St. Louis (1899), 152 Mo. 596, 54 S. W. 438.

[5] Shields v. O'Reilly (1896), 68 Conn. 256, 36 Atl. 49.

California statute as it has been construed, even this would seem doubtful.

After a divorce several situations are presented:

1. No provision for custody or maintenance of the child is made in the divorce decree.[6] In such case, the father remains liable for support during the child's minority. That this rule is based on the first general principle stated above, i. e., of mutual rights to support and services, is shown by the refusal of the court to allow in such a case the claim of the second husband of the mother against the father for necessaries furnished the child.[7]

2. The divorce decree awards the custody of the children to the mother, but is silent as to their support. Where, under such circumstances, an action for past support is brought by either the mother or a third person, there are two lines of authority, (a) one upholding the liability of the father, and (b) one refusing recovery from him by either mother or third person furnishing necessaries to child, at her request.

(a) Some of these cases holding the father liable rest upon statutes;[8] others proceed under the second principle above presented, to wit, the policy of the law to withhold from children none of their rights on account of the dissensions of their parents.[9]

(b) The cases in this class, proceeding upon the first principle, refuse to allow a recovery from a father for the past support of a child.[10] In several of these cases the dicta of the court go beyond the point decided, and assert the father's liability to be definitely terminated by the failure of the mother at the time of divorce decree, to apply for the maintenance as well as for the custody of the child.[11] Such dicta have not, so far as known, actually detracted from the power of the court to make an order for the child's future support, but they present clearly the mistaken bent of the courts on the side of the theory of mutual services and liabilities, forgetting what should be the real basis of the award of the custody, i. e., the welfare of the child.[12]

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[6] Gilley v. Gilley (1887), 79 Me. 292, 1 Am. St. Rep. 307.

[7] Foss v. Hartwell (1897), 168 Mass. 66, 46 N. E. 411.

[8] Wilson v. Wilson (1873), 45 Cal. 399; Welches' Appeal (1876), 43 Conn. 342.

[9] Plaster v. Plaster (1868), 47 Ill. 290; Pretzinger v. Pretzinger (1887), 45 Ohio St. 452, 4 Am. St. Rep. 542; Holt v. Holt (1883), 42 Ark. 495; Stanton v. Wilson (1808), 3 Day. 37.

[10] Chester v. Chester (1885), 17 Mo. App. 657; Finch v. Finch (1853), 22 Conn. 411 (overruling Wilson v. Day, supra); McKay v. McKay (1899), 125 Cal. 45, 57 Pac. 677; Selfridge v. Paxton (1905), 145 Cal. 713, 79 Pac. 425; Washburn v. Catlin (1885), 97 N. Y. 623; Hancock v. Merrick (1852), 10 Cush. 41; Hall v. Green (1895), 87 Me. 122, 47 Am. St. Rep. 311; Husband v. Husband (1879), 67 Ind. 583; Brow v. Brightman (1883), 136 Mass. 187; Burnett v. Burnett (1859), 29 Bart. 124.

[11] Husband v. Husband, supra; Burnett v. Burnett, supra. See also Howell v. Howell (1894), 104 Cal. 45, 37 Pac. 770.

[12] Minor, Conflict of Laws, Sec. 96.

3. The custody is awarded to the mother. In such cases, on petition of the divorced mother entitled to custody of her child, courts have generally given orders against the father for future support of the child, either by virtue of statute,[13] or of the original jurisdiction of courts of chancery over the persons and estates of infants.[14] But in California, the assumption by Mr. Justice Temple [15] of the literal meaning of the Civil Code section was made the basis of a later decision [16] in which future support was ordered, but compensation for past support denied, and of another,[17] refusing a physician's claim against the father for services to a child in the custody of her mother. Here, however, a settlement agreement had been made at the time of the divorce decree.

The principal case seems to be the first in which real injustice was done. Under the code section, as it has been construed, the case is right. But why should the section, the only purpose of which manifestly is to insure the welfare of the child, ever have been thus construed? The only ground upon which the guardianship proceeding in the McMullin case could have been sustained is that the father was guilty of some misconduct. A construction which allows one by reason of his own wrong doing to shift a duty from his shoulders is somewhat startling. M. O.

Pleading—Should Fraud be Pleaded in the Complaint, or is Evidence of Fraud Admissible Under the Replication Implied by Section 462 of the Code of Civil Procedure of California.—The days when a declaration was held bad because the pleader used the abbreviation A. D. have passed away,—let us hope never more to return. But occasionally points of pleading still arise which must command serious consideration. One of those questions is that of pleading fraud,—when must you, and when need you not, plead it. The practice on this subject can hardly be said to be well settled when such able judges as Mr. Justice Henshaw and Mr. Justice Shaw express diametrically opposite views upon the question in two cases decided within a week of each other. In the case of Estate of Yoell,[1] in which the opinion was written by the former judge, a wife applied for a family allowance, the representatives of the decedent set up a separation agreement which would destroy her right to an allowance, and the wife sought to show that the agreement was (to use the striking language of the gifted judge), secured by fraud "so comprehensive and apprehensive in its perfidiousness that it would have excited the envious

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[13] Buckminster v. Buckminster (1865), 38 Vt. 248, 38 Am. Dec. 652; Erkenbrach v. Erkenbrach (1884), 96 N. Y. 456; McKay v. McKay (1899), 125 Cal. 65, 57 Pac. 677; Civil Code of Cal., Sec. 139.

[14] Cowls v. Cowls (1846), 8 Ill. 435; 44 Am. Dec. 708.

[15] Ex parte Miller (1895), 109 Cal. 643, 42 Pac. 428.

[16] McKay v. McKay (1899), 125 Cal. 65, 57 Pac. 677.

[17] Selfridge v. Paxton (1905), 145 Cal. 713, 79 Pac. 425.

[1] Estate of Yoell, decided Jan. 20, 1913, 45 Cal. Dec. 125.